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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. 1036

RUSSELL LASH, as Warden of the Indiana State Prison,

Petitioner,

vs.

GEORGE ROBERT BROWN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1970

NO.

RUSSELL LASH, as Warden of the Indiana State Prison,

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vs.

GEORGE ROBERT BROWN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Russell Lash, as Warden of the Indiana State Prison, respectfully prays that a Writ of Certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 30, 1970.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to this Petition. See Appendix, p. 1. Also appearing in the Appendix is the opinion rendered by the District Court for the Northern District of Indiana, South Bend Division, in this cause. See Appendix, p. 15.

JURISDICTION

The judgment for which review is sought was entered on September 30, 1970, by the Court of Appeals for the Seventh Circuit. A petition for rehearing was not filed in this cause. An extention of time within which to file this petition was not sought in this cause. This petition for certiorari was filed within ninety (90) days of September 30, 1970, the day on which the judgment sought to be reviewed in this petition was entered. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals exceeded its authority when it remanded this cause to the District Court for further proceedings on an issue never presented by either of the parties to either the District Court or the Court of Appeals.

2. Whether the Court of Appeals misapprehended and misapplied 28 U.S.C. § 2254(d) when it ordered the District Court to hear anew issues fully and adequately heard in the State Courts.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

§ 2254. State custody; remedies in Federal Courts

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or

an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adquate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State Court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court

on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondent, George Robert Brown, hereafter referred to as the Prisoner, was convicted of first degree murder on December 13, 1957, after a trial by jury in the Lake County Criminal Court and was sentenced to death. The Prisoner's execution has been stayed from time to time is being stayed at this time. The Prisoner's conviction was affirmed on direct appeal to the Indiana Supreme Court. See *Brown v. State*, 239 Ind. 184, 154 N.E.2d 720 (1958), cert. den., 361 U.S. 936 (1960).

The Prisoner filed a *pro se* petition for writ of error coram nobis, the then existing Indiana post-conviction remedy, in the Lake Criminal Court, on May 10, 1960. The issues raised by the Prisoner in his coram nobis proceeding were the voluntariness of one of the five confes-

sions introduced in evidence against him at his 1957 murder trial and the competency of trial counsel. On June 1, 1960, after a full evidentiary hearing at which the Prisoner was represented by Robert S. Baker, serving as Public Defender, the Prisoner's petition for writ of error coram nobis was denied. On appeal, the Indiana Supreme Court affirmed the lower court's denial of prisoner's petition for a writ of error coram nobis. See *Brown v. State*, 248 Ind. 11, 221 N.E.2d 676 (1966), cert. den., 387 U.S. 925 (1967), reh. den. 389 U.S. 89 (1967). The Indiana Supreme Court affirmed the findings of the lower court that the prisoner's confession had been voluntary and that the Prisoner had been represented by competent counsel at his trial.

The Prisoner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana, South Bend Division, on December 29, 1967. In his petition, the Prisoner raised but two (2) issues: (1) Robert S. Baker, Prisoner's coram nobis counsel had incompetently represented him in the coram nobis proceedings; and, (2) Prisoner's death penalty had been unconstitutionally imposed because jurors conscientiously opposed to the death penalty were removed for cause, because the death penalty was imposed without guides or standards and because a death sentence constitutes a cruel and unusual punishment. The District Court held a hearing on the Prisoner's petition on March 6 and 7, 1968. On February 20, 1969, the District Court found that the Prisoner had not been denied competent counsel in the coram nobis proceedings as guaranteed by the Sixth Amendment to the Constitution of the United States and found that the Prisoner had not exhausted his available state court remedies on the death penalty issues. To show that Mr. Baker, coram nobis counsel, had incompetently represented him, the Prisoner introduced evidence in the

District Court which he claimed either supported his allegations or which he claimed impeached the testimony of witnesses against him at the coram nobis proceeding.

On March 19, 1969, the Prisoner petitioned the District Court to issue a certificate of probable cause and filed his notice of appeal. On April 2, 1969, the District Court issued a certificate of probable cause. An appeal to the Court of Appeals for the Seventh Circuit ensued. The Prisoner raised the two issues in the Court of Appeals which he pressed in the District Court, competency of coram nobis counsel and the death penalty issues. The Court of Appeals affirmed the decision of the District Court in these respects. The Court of Appeals affirmed the decision of the District Court that coram nobis counsel had competently represented Prisoner. See Appendix, p. 9. The Court of Appeals affirmed the decision of the District Court dismissing as to the death penalty issues for Prisoner's failure to exhaust his available state court remedies. See Appendix, p. 12. Nevertheless, the Court of Appeals declared that "the order appealed from is reversed and the cause remanded for an evidentiary hearing and further proceedings consistent with the opinion." See Appendix, p. 14.

The basis for the reversal by the Court of Appeals was 28 U.S.C. § 2254(d), requiring a federal evidentiary hearing if a petitioner in a federal district court habeas corpus proceeding sustains the burden of proving that a state court determination of a factual issue was incorrect, by convincing evidence. Of course, this was never an issue in either the District Court or the Court of Appeals. Nevertheless, the Court of Appeals in the first instance took the evidence introduced by the Prisoner to show the incompetence of his coram nobis counsel, denominated it as newly

discovered evidence, and concluded ". . . that the facts were not adequately developed at the coram nobis hearing and an evidentiary hearing and findings on the factual issues are required in district court." See Appendix, p. 11.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW, REVERSING THE ORDER OF THE DISTRICT COURT ON AN ISSUE RAISED BY NEITHER OF THE PARTIES IN NEITHER OF THE COURTS BELOW, CONFLICTS WITH DECISIONS OF THIS COURT, WITH DECISIONS OF OTHER COURTS OF APPEAL AND WITH OTHER DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS.

The court below held that the order of the District Court appealed from ". . . is reversed and the cause remanded for an evidentiary hearing and further proceedings constitent with the opinion . . ." Appendix; p. 14.

In his petition, filed with the District Court on December 29, 1967, the Prisoner made two claims: (1) that Robert S. Baker, Prisoner's state coram nobis counsel had incompetently represented him in the state coram nobis proceedings; and (2) that the Prisoner's death penalty had been unconstitutionally imposed because jurors conscientiously opposed to the death penalty were removed for cause, because imposed without guides or standards and because a death sentence constitutes a cruel and unusual punishment. On February 20, 1969, the District Court found that the Prisoner had not been denied competent counsel in the coram nobis proceedings and found that the Prisoner had not exhausted his available state court remedies in the death penalty issues.

On appeal, the Prisoner urged as grounds for reversal: (1) that the District Court erred when it found that Prisoner had been competently represented by counsel at the state coram nobis proceeding; and, (2) that the District Court erred when it denied relief on the death penalty issues, for Prisoner's failure to exhaust his state court remedies. As to these two issues, the only two raised by the Prisoner on appeal, the court below affirmed. Reciting the findings of the District Court that the Prisoner had been competently represented in the state coram nobis proceeding, the Court of Appeals said that "[w]e would have no difficulty in concluding that the finding was not clearly erroneous." Appendix, p. 9.

As to the District Court's decision regarding the death penalty issues, the Court of Appeals agreed that the District Court had properly refused relief for the Prisoner's failure to exhaust state court remedies. Appendix, p. 12. Nevertheless, the Court of Appeals reversed the order of the District Court denying relief and remanded the cause for an evidentiary hearing and further proceedings consistent with the court's opinion. Appendix, p. 14.

The reason for the reversal is found in that section of the court's opinion entitled "The Sufficiency of the Coram Nobis Hearing." Appendix, pp. 9-11. The Court of Appeals said:

> "With all respect, however, to counsel and to the district court, we think that the fact Brown had counsel at the state post-conviction hearing does not necessarily establish that the facts were adequately developed there, nor bar him from an evidentiary hearing in federal district court on the voluntariness of his confession." Appendix, p. 9.

Construing and applying 28 U.S.C. § 2254(d) and *Townsend v. Sain*, 372 U.S. 293 (1963), the Court of Appeals

discovered that the testimony introduced by the Prisoner at the District Court hearing to show the incompetency of the Prisoner's state coram nobis counsel should have been considered on the issue of whether the facts were adequately developed at the State coram nobis hearing on the voluntariness of Prisoner's confession. The Court of Appeals concluded:

> ". . . We conclude that the facts were not adequately developed at the coram nobis hearing and an evidentiary hearing and findings on the factual issues are required in the district court." Appendix, p. 11.

The adequacy with which facts were developed in the state coram nobis proceeding was neither an issue in the District Court nor in the Court of Appeals. If it could have been considered as having been indirectly raised by way of the competency issue, the Court of Appeals was required to find that the facts were adequately developed in the state courts, in view of its finding that Prisoner's counsel at state coram nobis proceeding had competently represented him.

The Court of Appeals reversed the order of the District Court. Yet, what basis there could have been for reversing the order of the District Court on an issue raised neither in the District Court nor in the Court of Appeals? A reversal signifies error. Yet, where in the record did the District Court err? Was there an adverse ruling? Was there an adverse order? The answer must be no. There is nothing in the record of this cause upon which error can be predicated.

Petitioner can find few cases directly on point. There would appear to be but one case in which this exact fact situation is reported. See *United States ex rel. B. v. Shelby*, 430 F.2d 215, 218, ft. #4 (2nd Cir. 1970). In

Shelby, neither party had raised an issue under 28 U.S.C. § 2254(d) in either the district court or the court of appeals. The court of appeals was of the opinion that a 2254(d) issue could not be considered because it had been raised by neither of the parties in either the district court or the court of appeals. Thus, the decision below directly conflicts with a decision on similar facts of the Court of Appeals for the Second Circuit. However, there are a number of decisions by this Court, by other Courts of Appeal and by the Seventh Circuit itself in which the principle is clearly established that an issue not raised by the parties and which does not appear of record cannot serve as the basis for reversing the judgment of a lower court. Sometimes it is said that a federal district court should not be reversed on grounds not urged there. Other times, it is said that issues not raised by the parties are not before the reviewing court. For instance, declining to reassess the doctrine of entrapment in *Sherman v. United States*, 356 U.S. 376 (1958), this Court said that ". . . [w]e do not ordinarily decide issues not presented by the parties . . ." because, for one thing, the doctrine would had to have been reassessed without the full considered argument of the parties. In this same vein, see also *Neely v. Ebg Construction Co.*, 386 U.S. 317, 330 (1967) and *Tyrrell v. District of Columbia*, 243 U.S. 1, 5-6 (1917).

Stating the proposition in the alternative, this Court has declared that the proposition is that issues not urged in the district court are not subject to review. *Johnson v. United States*, 318 U.S. 189 (1943). All the circuits have a similar rule including the Seventh Circuit Court of Appeals. See, by Circuit, *J. F. White Contracting v. New England Tank Industries of New Hampshire, Inc.*, 393 F.2d 449, 451 (1st Cir. 1968); *Schwartz v. S. S. Nassau*, 345 F.2d 465, 466 (2nd Cir. 1965), cert. den. 382 U.S. 919;

Walker v. Sinclair Refining Co., 320 F.2d 302, 305 (3rd Cir. 1963); *Roberts v. United States*, 316 F.2d 469, 497 (3rd Cir. 1963); *Fidelity and Casualty Company of New York v. Jackson*, 297 F.2d 230, 234 (4th Cir. 1961); *Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc.*, 414 F.2d 872, 876 (5th Cir. 1969); *Walter v. United States*, 295 F.2d 720, 721 (6th Cir. 1961); *Grain Merchants v. Union Bank*, 408 F.2d 209, 218 (7th Cir. 1969); *Dessert Palace, Inc. v. Salisbury*, 401 F.2d 320, 324 (7th Cir. 1968); *Christianson v. United States*, 226 F.2d 646, 654 (8th Cir. 1955), followed in *Wiley v. United States*, 257 F.2d 900, 908 (8th Cir. 1958); *Boeing Airplane Co. v. Brown*, 291 F.2d 310, 316 (9th Cir. 1961); *Eureka-Carlisle Co. v. Rottman*, 398 F.2d 1015, 1019 (10th Cir. 1968); *Brown v. Collins*, 402 F.2d 209, 213 (D.C. Cir. 1968).

There are exceptions to this line of cases. Occasionally, a case may be decided on a constitutional issue not raised by the parties. Sometimes a case may be decided for plain error appearing of record. However, the decision of the Court of Appeals in this case cannot be brought within any of the exceptions to the general rule. The inescapable conclusion is that the Court of Appeals substantially exceeded its authority in reversing the order of the District Court in this cause on an issue raised by neither of the parties in neither of the courts below. The decision of the Court of Appeals in this regard conflicts in principle with decisions of this Court, with decisions of other Courts of Appeal and with other decisions decided by the Seventh Circuit. The decision of the Court of Appeals in this case sufficiently departs from the bounds of acceptable review as to require correction by this Court on review by writ of certiorari.

II.

THE DECISION BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL APPELLATE PROCEDURE REQUIRING THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS OVER LOWER FEDERAL COURTS.

The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. As the cases in the preceding pages disclose, the trial court should not be reversed on issues neither urged nor claimed to be before it. Secondly, a reviewing court is not at liberty to decide cases on issues neither raised nor appearing on the record before the reviewing court except in exceptional circumstances. No exceptional circumstances exist in this case.

The decision below if allowed to stand has a particularly insidious affect upon the preparation for and conduct of appeals in the federal courts. In this case, counsel had no notice of the issue decided by the Court of Appeals. Hence, counsel had no opportunity in which to build a record in the District Court or present arguments in the Court of Appeals on the issue on which the case was decided. Claims must be made, orders entered and objections taken in the District Court in order to preserve error for appeal. On appeal, the reviewing court is limited to reviewing issues appearing of record. **The ground for the reversal by the court below was never an issue in either the District Court or the Court of Appeals. How could it have been an issue? Neither of the parties raised the matter. The District Court was never called upon to make any rulings with respect to that issue.**

The adopted procedure, reflected in the decision of the court below, is a substantial variance from proper and accepted standards of judicial review. Having affirmed the decision of the District Court on the issues which were presented to the Court of Appeals, there is no other basis upon which to affirm the decision of the Court of Appeals should this Court accept this case for review and reverse the decision of the Court of Appeals to remand for a second evidentiary hearing.

Turning to the substantive merits of the decision of the court below, Petitioner submits that the court below erroneously construed and applied 28 U.S.C. § 2254(d). First of all, the Court of Appeals decided, in the first instance, that an evidentiary hearing should be held because factual issues regarding the voluntariness of the Prisoner's confession were not adequately resolved in the state coram nobis proceeding. This is a matter, in the first instance, for the District Court, not the Court of Appeals. The Prisoner had a full and fair hearing in the state coram nobis hearing which was affirmed on appeal. The Prisoner was fully and adequately represented by competent counsel as was held by both the District Court and the Court of Appeals. The Court of Appeals appears to believe that, since all of the evidence which could have been introduced in the state coram nobis proceeding to support the Prisoner's claims was not introduced, the facts were not adequately developed in the state coram nobis proceeding and the Prisoner was entitled to a new hearing on this same issue in the District Court. Petitioner submits that in this regard the Court of Appeals also erred.

All circuits construing 28 U.S.C. § 2254(d) have announced that, in federal habeas corpus proceedings, state adjudications shall be presumed correct if the factual

determination in the state is fairly supported by the record made in the state court. See *U.S. ex rel. Dickerson v. Rundle*, 430 F.2d 462, 464 (3rd Cir. 1970). In this case, the Prisoner had a full and fair hearing in the state coram nobis proceeding. The state trial court found that the Prisoner's confession had been voluntary. The Indiana Supreme Court affirmed. The evidence heard by the state trial court, also comprising the record before the Indiana Supreme Court, fully supports the state court findings that the Prisoner's confession was voluntary. The record of the state coram nobis proceeding was before the District Court. The Prisoner is not entitled to an evidentiary hearing in the District Court on the issue of the voluntariness of his confession.

28 U.S.C. § 2254(d) is a congressional codification of his Court's decision in *Townsend v. Sain*, 372 U.S. 293 (1963). In Townsend, this Court declared that ordinarily the District Court should accept the facts as found in a state court hearing. Although the hearing power of the District Court is discretionary it cannot be used to subvert the integrity of state criminal justice or waste the time of the federal courts in the trial of frivilous claims. 372 U.S., at p. 318. In this case, the District Court did in fact conduct an evidentiary hearing. At that hearing, the Prisoner introduced evidence to show that Prisoner's state coram nobis counsel was incompetent. Both the District Court and the Court of Appeals found Prisoner's state coram nobis counsel to be competent. To show that coram nobis counsel was incompetent, the Prisoner produced facts which could have been presented at the state coram nobis hearing, which the Prisoner contended would have changed the outcome of the coram nobis proceeding. Many of the same witnesses who testified at the state coram nobis proceeding also testified at the evidentiary hearing of the District

Court. Now, if the decision below is not reversed, the Prisoner will be entitled to another hearing in the District Court. The Prisoner will have his third post-conviction hearing, not because he did not have a full, fair and adequate hearing in the state coram nobis proceeding, but because all of the facts which could have been introduced in the state coram nobis proceeding, were not introduced. This Petitioner submits is a misuse, misconstruction and misapplication of 28 U.S.C. § 2254(d). What can the District Court do on remand? Must it conduct an evidentiary hearing on evidence it has already heard? What's more, while the District Court is considering the evidence already heard in a new light as it bears on another issue, the Prisoner will be prosecuting the death penalty issues in the state court as a condition precedent to applying for habeas corpus relief at a later time in the District Court. After thirteen years of litigation, there is no end in sight in this case. This does not lend itself to the orderly administration of criminal justice. The questions which Petitioner seeks to raise through this Petition are important and require this Court's thorough consideration, with briefs on the merits and the arguments of counsel.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

September Term, 1969 — January Session, 1970

No. 17581

George Robert Brown,
Petitioner-Appellant,
v.
Russell Lash, Warden, Indiana State Prison,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

September 30, 1970

Before Swygert, *Chief Judge,* Kiley and Fairchild, *Circuit Judges.*

Fairchild, *Circuit Judge.* This is an appeal from a denial of habeas corpus. Petitioner George Brown was convicted in an Indiana court of first degree murder. The jury decreed the death penalty. In a state coram nobis proceeding, petitioner claimed, among other things, that his trial counsel, Mr. Stenhouse, was ineffective; that his confession was involuntary, and that evidence of other crimes had been improperly introduced. His coram nobis petition was denied.

Petitioner filed in federal district court the application for writ of habeas corpus now under consideration. He alleged that his confession was involuntary and that Mr. Baker, Public Defendant, who had appeared for him at the

coram nobis hearing, had failed to provide effective assistance of counsel in establishing coercion. He also challenged the imposition of the death penalty on various constitutional grounds, procedural and substantive.

The district court, after hearing, found that Mr. Baker had fulfilled the minimum standards for effective assistance of counsel. The court declined to rule on the matter of exclusion of jurors opposed to the death penalty since the Indiana courts had not had an opportunity to consider a claim of that nature since *Witherspoon v. Illinois.*[1] Other points had apparently been ruled on orally, adversely to petitioner, and the petition was denied. Petitioner appealed.

Petitioner's conviction occurred December 13, 1957. The case has a long history and execution has been stayed from time to time.[2]

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[1](1968), 391 U.S. 510.

[2]Petitioner's conviction was affirmed in *Brown v. State* (1958), 239 Ind. 184, 154 N.E.2d 720, cert. denied, without prejudice to application for writ of habeas corpus, 361 U.S. 936. An application to the district court was dismissed (1960) for failure to exhaust state remedies. Brown filed a petition for writ of error coram nobis in the Indiana trial court. It was denied. The state public defender who had appeared for him at the coram nobis hearing refused to obtain a transcript or assist an appeal and the state trial and supreme courts denied a transcript and appointment of other counsel. *Brown v. State* (1961), 241 Ind. 298, 171 N.E.2d 825, cert. denied without prejudice to an application to a district court for habeas corpus, 366 U.S. 954. Petitioner obtained a federal order requiring his release unless the state provided him an appeal. *United States v. Lane* (N.D. Ind., 1961), 196 F. Supp. 484; *United States v. Lane* (7th Cir., 1962;, 302 F.2d 537; *Lane v. Brown* (1963), 372 U.S. 477, 9 L.Ed. 2d 892, decided the same day as *Gideon v. Wainwright*, 372 U.S. 335, and *Douglas v. California*, 372 U.S. 353, which brought about a vast expansion in the practice of criminal law, as well as *Fay v. Noia* (372 U.S. 39), and *Townsend v. Sain*,

The Confession.

Petitioner Brown was an inmate of the Lake county jail throughout April, 1957. He had been free on bail, charged with theft, and failed to appear for trial. He was brought to the jail March 31, after apprehension in Nevada. While Brown was in the jail, the Gary police referred a tip that Brown had told his wife about killing a woman the summer before and concealing her body. Mrs. Brown was contacted and showed the deputies the place Brown had pointed out. The deputies dug, but found nothing. In sequence that is somewhat in dispute, they questioned him at times at the jail and took him one or more times to the site; he made oral admissions and signed a detailed confession. Thereafter he admitted many other offenses.

He related that on a rainy evening the summer before he picked up a woman walking along the highway after her car had stalled, he had parked off the main route, had choked her to death, pulled her body off the road, and covered it with stones; he took her purse, and, after removing her money, burned the purse and buried the remnants at his home. With this information, the deputies were able to find the body a short distance from the area where they had looked earlier. With Brown's help, they recovered the partially burned purse and contents at Brown's home.

The contents of the purse contained papers of Mrs. Mildred Grigonis. Her husband and sister identified the

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372 U.S. 293. Present counsel for petitioner was then appointed by the trial court. The denial of coram nobis was later affirmed, *Brown v. State* (Ind., 1966), 221 N.E.2d 676, cert. denied 387 U.S. 925, reh. denied 389 U.S. 891. The petition for writ of habeas corpus now under consideration was filed December 29, 1967.

purse and contents, a denture, and a pin. She had failed to return home after work the evening of August 17, 1956. Her car had been found at the location described by Brown.

The coram nobis proceeding.

Brown supported his claim that his confession was not voluntary by assertions that he was subjected to protracted questioning and that threats and inducements were made. In his coram nobis petition he alleged the questioning lasted approximately two weeks, and in his habeas corpus petition, a period of five to seven days.

The state's position is that no threats or inducements were made and that the questioning which led up to the confession of the Grigonis murder took place only during the afternoon and evening of Monday, April 29, 1957. The deputies testified, and certain records indicate, that the tip from the Gary police was received about 10:30 p.m., Saturday, April 27, the written confession was dated April 29 at 8 p.m., and the body was found Tuesday, April 30. Brown reenacted the events on April 30 and made an additional oral admission May 1. It is clear that Brown was questioned about other offenses up to May 8. His confession of the rape and murder of Lana Brock is dated May 1, at 6 p.m., his confession of several assaults is dated May 4, at 12:30 p.m.; and a deputy testified at trial he was questioned about other events May 7 and 8.

The coram nobis hearing was held June 1, 1960. Mr. Baker, on Brown's behalf, read his petition into the record, and it was accepted as evidence. The petition detailed his claim with respect to protracted questioning and threats, as well as other claims. The transcript of the trial was also submitted. At trial, however, there had been no objection to the confession and no real exploration as to its voluntary

character. At the 1960 hearing, the deputies who had been active in the investigation, Chief Singer, Uzelac, and Garapich, testified. Several others who had been on duty at the jail were called. All denied making any threats or inducements. Brown testified in rebuttal.

Mr. Stenhouse, Brown's counsel at trial, testified that he did not object to the admission of the confession; he discussed it with Brown, who told him it was true and given freely and voluntarily. Stenhouse testified that Brown had not told him of any of the facts on which Brown based his present claim that the confession was inadmissible. Brown testified he had told these things to Stenhouse.

The trial court made no particularized findings of fact; the record shows only an order that Brown's petition was denied.

New Evidence.

Brown's present counsel, Mr. Cohen, presented in the habeas corpus hearing several items of evidence which were not presented at the coram nobis hearing. Some of these tend, arguably, to corroborate Brown's claim that he was questioned over a longer period about the Grigonis murder and to corroborate a threat he attributed to a guard at the jail.

Some of the new evidence arguably tended to show (1) that the tip which initiated the investigation which uncovered the Grigonis killing was not received April 27, but earlier; (2) that more than 2 days intervened between the tip and the confession; (3) that one officer at the jail expressed hostility and made a threat; (4) that Brown had been taken from his cell and stripped; and (5) that some of the relevant records were not maintained in ordinary

course. (6) It is also argued that the confession was really made April 30 and dated back to April 29.

(1) *The April 27 date.* Bard, the Gary officer who relayed the tip, testified that he was not on duty Saturdays, such as April 27, 1957. The records of a weather observatory, only a few miles from the site of the killing indicate that on April 27 the total precipitation was .71 inches, but that there was no precipitation after 6 p.m. The last previous day on which there had been precipitation throughout the evening and into the early morning hours was April 17. The total precipitation on April 17 was .52 inches. At the 1957 trial, Uzelac testified, in describing the place pointed out by Mrs. Brown the evening the tip was received, "it had just rained previous and it was awful wet." In a deposition in 1968 before the habeas corpus hearing, he testified to the effect that there was a slow misting rain continuing during all the evening hours and until 2 a.m. If the latter description be correct, the weather records indicate the date was Wednesday, April 17, not April 27.

(2) *Duration of questioning.* Bard testified that Uzelac called him several days after the tip and said they weren't getting anywhere with Brown. Bard said a week to ten days elapsed between the tip and the confession. Jackson and Quinn had been inmates in the so-called criminal section of the jail at the time Brown was in that section. Jackson testified that Brown was taken out two or three times a day for several hours and that a week to ten days elapsed from the time Brown was brought to that part of the jail until Jackson learned Brown had confessed killing a woman. Quinn testified similarly except he estimated the time at close to two weeks. It does appear that Brown was questioned from April 29 to May 8, but the testimony of the deputies is that almost all the questioning after April 30 related to other matters.

(3) *Threat.* One of the threats alleged by Brown, but attributed to a deputy other than Singer, Uzelac, or Garapich, was:

> "Mildred Grigonis is a blood relative of mine. If you don't make a confession and tell us where you hid her body, I'll come in that cell and hang you. I ought to come in there and hang you whether you confess or not . . ."

Mr. Grigonis had reported his wife's disappearance to the police. The record does not show, however, whether the deputies linked Brown with her disappearance until they found papers bearing her name.

Jackson testified that when an officer brought Brown into the section he told Brown that Brown had killed a relative of his and if he had a chance, he would hang Brown. Jackson understood the relative referred to was the beautician (Mrs. Grigonis). Quinn testified that the officer said that if he got a chance, he'd cut Brown's throat. Brown, Jackson, and Quinn were each unable to identify the officer. No witness, including Mr. Grigonis and his son, knew anything about Mrs. Grigonis being related to any officer. It appeared that Lana Brock, another victim of Brown, was the niece of an East Chicago police officer, but the record does not indicate any contact between Brown and that officer. Moreover her body had been found the previous October.

(4) Jackson also corroborated Brown's claim that a deputy had taken Brown from his cell and forced him to remove his clothing. There was testimony, however, that any incident which might have been referred to was a search.

(5) *The records.* A form called an "Offense Report" indicates the tip was received at 10:30 p.m. April 28

(Sunday). It contains a narrative describing the tip, the interview with Mrs. Brown and the first digging at the spot she pointed out. Testimony as to the usual practice shows that if this report had been made out Sunday, April 28, the date of the tip being really April 27, it would have been given a serial number Monday, April 29. The number it bears, however, is subsequent to the serial number given a report on another case May 3.

A card entitled "Prisoner's Record" is made out for each inmate of the jail. These cards are filed by serial number and kept permanently. Few if any have been lost, but Brown's card can not be found. Presumably it would record the date on which he was transferred to the criminal section of the jail.

(6) *The date of the written confession.* The confession is dated April 29 at 8 p.m. Brown claims that it was made April 30. This claim is predicated upon references in the text to locations pointed out to the deputies "this afternoon". Brown reenacted the events April 30, after the body was found. The confession, however, contains no reference to the finding of the body or purse, nor the identity of the victim. There is one version of testimony and one document indicating that Brown had been taken to these locations Monday, April 29 after his first oral admission and before the confession was put in writing. Brown's claim (6) is not very persuasive.

The issue submitted to the district court at the habeas corpus hearing was whether Mr. Baker had rendered effective assistance of counsel at the coram nobis hearing. The district court was not asked to, nor did it, reach the ultimate issue whether the confession was involuntary. The district court found that Mr. Baker was a well qualified and experienced attorney, fully capable of rending the

assistance to which Brown was entitled. Mr. Baker is now deceased, but his associate testified concerning Mr. Baker's activity in connection with Brown's case before the coram nobis hearing, and the record of that hearing was before the district court. The district court found "that although there may have been more that could have been done in preparing for the hearing, what was done was sufficient to satisfy the requirements of due process of law. . . . The facts in this case at bar clearly show that the conduct of the Public Defender was not such as to reduce the coram nobis hearing to a farce, a sham, or a travesty of justice."[3]

We would have no difficulty in concluding that the finding was not clearly erroneous.

The sufficiency of the coram nobis hearing.

With all respect, however, to counsel and to the district court, we think that the fact that Brown had counsel at the state post-conviction hearing does not necessarily establish that the facts were adequately developed there, nor bar him from an evidentiary hearing in federal district court on the voluntariness of his confession.

The ultimate constitutional issue raised by Brown is whether Brown's will was overborne and his confession involuntary. He alleged enough in terms of protracted questioning, threats, and inducements to entitle him to a reliable determination of the relevant facts and the ultimate issue by a trier of fact. He was entitled to an evidentiary hearing and findings in the district court unless the district court was required to, or could properly, deem the

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[3]The court cited *United States v. Dilella* (7th Cir., 1965), 354 F.2d 584, 587; *Lunce v. Dowd* (7th Cir., 1968) 261 F.2d 351, 354; *Lunce v. Overlade* (7th Cir., 1957), 244 F.2d 108, 110; *Feeley v. Ragen* (7th Cir., 1948), 166 F.2d 976; *MacKenna v. Ellis* (5th Cir., 1960), 280 F.2d 592.

factual issues adequately resolved by the state court in the coram nobis proceeding.

The threshold question is to be answered by applying 18 U.S.C. § 2254(d). It provides that a state court determination of a factual issue, properly evidenced, shall be presumed to be correct unless one or more listed conditions be established. The presumption is rebuttable, but the petitioner has the burden of doing so by convincing evidence. The subsection was enacted in 1966, and the list is similar in part to the list set forth in *Townsend v. Sain.*[4] *Townsend* held that if one or more of the listed conditions exists, a federal evidentiary hearing is required.

Subsection (d) operates only where the state court determination is "evidence by a written finding, written opinion, or other reliable and adequate written indicia". The only written determination in the coram nobis proceeding was that the petition was "denied". Under the circumstances, however, we think the denial fairly implies a negative factual finding on Brown's claim rather than any other rationale of decision.

Condition (3) in subsection (d) specifies "that the material facts were not adequately developed at the State court hearing". This corresponds to Condition (5) in the *Townsend* list. In discussing Condition (5) the Supreme Court said, "The conventional notion of the kind of newly discovered evidence which will permit the reopening of a judgment is, however, in some respects too limited to provide complete guidance to the federal district judge on habeas. If, for any reason not attributable to the inexcusable neglect of petitioner . . ., evidence crucial to the adequate consideration of a constitutional claim was not

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[4] (1963), 372 U.S. 293, 313, 9 L.Ed.2d 770, 786.

developed at the state hearing, a federal hearing is compelled."[5]

We have summarized the new evidence under six headings. It is not all equally significant, and we have already indicated that (6) is not persuasive. The state court made its credibility determinations between Brown and the witnesses adverse to him and weighed the evidence without the corroboration afforded Brown by the testimony of Bard and the two jail inmates. Because the district court limited its consideration to the effectiveness of counsel, the district court has never determined credibility, or weighed testimony as between those adverse to Brown, on the one hand, and Brown, Bard, and the two inmates on the other. Under the circumstances the failure to produce the new evidence at the coram nobis hearing can not be charged to Brown as inexcusable neglect.[6] We conclude that the facts were not adequately developed at the coram nobis hearing and an evidentiary hearing and findings on the factual issues are required in the district court.

Challenges to death sentence.

We need deal only briefly with the attack on the death sentence since there will be further proceedings in the district court to determine whether the conviction itself is valid.

The death sentence issues are:

(1) The "Witherspoon" issue: whether the exclusion for cause of jurors expressing scruples against the death penalty violated Brown's rights.

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[5] *Townsend*, p. 317.
[6] See *Fay v. Noia* (1963), 372 U.S. 391, 439.

(2) Whether the determination of guilt and penalty in one verdict violated his rights.

(3) Whether the death penalty is cruel and unusual punishment.

(4) Whether failure to prescribe standards to guide the jury in considering the penalty violated his rights.

Witherspoon v. Illinois[7] was decided after Brown filed his petition in the district court. The court reasoned that although it would have been fruitless for Brown to have raised issue (1) in the Indiana courts at the time he filed his petition, *Witherspoon* has sufficiently changed matters so that it is appropriate to afford the Indiana courts the first opportunity to consider this issue in Brown's case. We agree, and think that the other death sentence issues should be submitted to the Indiana courts along with (1).

The Attorney General of Indiana, by brief, has assured the court that Indiana Supreme Court Rule PC1 provides a proceeding in which Brown could be present at least issue (1), and that he will not be barred by having raised other claims in his coram nobis proceeding.

We note that the Supreme Court of the United States has granted certiorari in cases involving issues (2) and (4).[8]

Our study of the record moves us to note that when and if death sentence issues (2) and (4) are reached for consideration, such issues are highlighted in this case because of the mass of evidence of other offenses which was before

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[7](1968), 391 U.S. 510.

[8]*Crampton v. Ohio* (1969), 18 Ohio St.2d 182, 248 N.E.2d 614, cert. granted, 398 U.S. 936; *McGautha v. California* (1969), 70 Cal.2d 770, 452 P.2d 650, cert. granted 398 U.S. 936.

the jury. This evidence was held competent, since Brown had raised the issue of insanity.[9] The defense of insanity failed, but the evidence of the other offenses may well, it seems, have affected the jury's choice of the death penalty. It is true, of course, that other offenses committed by a convicted person normally are considered in fixing the penalty. Usually, however, these matters are separately considered at a stage where the accused may speak in answer without waiving his right of silence before verdict of guilt.

Brown was only 24 when he killed Mrs. Grigonis, and there is evidence that he killed her when she resisted his sexual advances. He had been committed to the reformatory for a sexual assault at age 16. From age 20 to 23 he was under commitment to a hospital as a dangerous sexual psychopath. In May, 1957 he admitted a number of sexual assaults in the fall of 1956 and winter of 1957. Not only were his written statements brought before the jury, but the officers testified to his oral admissions, and three of the victims testified. One of the offenses was the abduction, rape, and murder of Lana Brock, a 16 year old girl, in September 1956. Not only was his written statement introduced, but the girl's mother testified, photographs of her body were received, and the physician who performed the autopsy testified that she must have still been living when Brown buried her in a pile of sand after the assault.

In Brown's case, such issue of guilt as existed was raised by the defense of insanity. That defense having failed, the jury determined the penalty in the same verdict and after hearing the same evidence. It seems clear that Brown's offenses were in some degree the product of his abnormality, although the Indiana definition of the defense of insanity was not fulfilled. For Brown, the price of

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[9] *Brown v. State* (1958), 154 N.E.2d 720, 721.

attempting the defense of insanity was to put this mass of highly unfavorable information before the jury without any guidance on the considerations appropriate in choosing the penalty.

Mr. Max Cohen of the Gary, Indiana bar has served most diligently as counsel for Brown ever since his appointment by the Indiana trial court in 1963. We are grateful for his dedicated service.

The order appealed from is reversed and the cause remanded for an evidentiary hearing and further proceedings consistent with the opinion. The stay of execution of the sentence of death is continued in force until further order of the district court.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GEORGE ROBERT BROWN	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL NO. 4129
	)	
WARD LANE, WARDEN of INDIANA STATE PRISON,	)	
	)	
Respondent.	)	

ORDER

The Court has before it the Petition for Writ of Habeas Corpus filed December 29, 1967. The petitioner Brown is presently confined in the Indiana State Penitentiary awaiting execution of a sentence of death as the result of a judgment of conviction in the Lake Criminal Court on December 13, 1957, for murder in the perpetration of a robbery.

Petitioner avers that his detention and pending execution unlawfully deprive him of his life and liberty in that the judgment of conviction was obtained in violation of his constitutional rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Although petitioner raises several grounds in support of his petition, all but two of the issues raised were resolved against the petitioner by the Court at the time of oral argument on May 23, 1968. The two remaining issues are

the competency of counsel at the June 1, 1960, coram nobis hearing and the exclusion of certain jurors who entertained conscientious or religious scruples against the death penalty at the time of his trial in state court in 1957. A two-day evidentiary hearing was held in this Court on March 6 and 7, 1968, regarding the competency of counsel issue.

After a careful consideration of the allegations raised by the petitioner, of the law applicable thereto, of the briefs submitted by both parties, and of the oral argument, it is the opinion of the Court that petitioner was not denied his right to competent counsel as guaranteed by the Sixth Amendment, and as to the issue raised by and based on *Witherspoon v. Illinois*, 391 U.S. 510 (1968), petitioner has not exhausted the remedies available to him in the state courts as required by 28 U.S.C. § 2254.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that petitioner's Petition for Writ of Habeas Corpus be, and the same, is hereby, DENIED.

/s/ ROBERT A. GRANT
DISTRICT JUDGE

ENTER: February 20, 1969

MEMORANDUM

Petitioner was convicted in the Lake Criminal Court, Crown Point, Indiana, on December 13, 1957, of murder in the perpetration of a robbery and was sentenced to death. A direct appeal was taken to the Indiana Supreme Court where the judgment of conviction was affirmed. *Brown v. State*, 154 N.E.2d 720 (1958). A petition for writ of certiorari was then filed in the United States Supreme Court, but said petition was denied without prejudice to

petitioner's right to file a writ of habeas corpus. *Brown v. State*, 361 U.S. 936 (1960). Petitioner filed a petition for writ of habeas corpus in this Court on February 26, 1960. It was subsequently dismissed for failure to exhaust available state remedies. *Brown v. Lane*, South Bend Civil No. 2700 (1960).

On May 10, 1960, petitioner filed his petition for writ of error coram nobis in the Lake Criminal Court. After a hearing on June 1, 1960, the petition was denied. Thereafter petitioner filed his request for a transcript and court appointed counsel at public expense. The trial court denied the request and the Supreme Court of Indiana affirmed. *Brown v. State*, 171 N.E.2d 825 (1961). Petition for writ of certiorari was filed in the United States Supreme Court, and it was denied without prejudice. *Brown v. State*, 366 U.S. 954 (1961).

Petitioner next proceeded to file his petition for writ of habeas corpus in this Court, and the writ was granted. *United States v. Lane*, 196 F.Supp. 484 (1961). The Court of Appeals for the Seventh Circuit affirmed, but directed that petitioner continue to be held in custody pending final disposition of the case by the United States Supreme Court. *Brown v. Lane*, 302 F.2d 537 (1962). The United States Supreme Court vacated the Judgments of the lower courts and entered an order directing petitioner's discharge unless, within a reasonable time, the State of Indiana provide him an appeal on the merits to the Indiana Supreme Court from the trial court's denial of his petition for writ of error coram nobis. *Lane v. Brown*, 372 U.S. 477 (1963).

Pursuant to the mandate of the United States Supreme Court, the Indiana Supreme Court ordered the Lake Criminal Court to provide the petitioner with a transcript and to appoint counsel. On September 23, 1963, petitioner's

court-appointed counsel filed a petition for rehearing on the petition for writ of error coram nobis. On December 30, 1963, the Court sustained the State's motion to strike the petition for rehearing.

In January of 1965, petitioner perfected his appeal from the trial court's denial of his petition for writ of error coram nobis to the Indiana Supreme Court. The judgment of the Lake Criminal Court was affirmed. *Brown v. State*, 221 N.E.2d 676 (1966). Petition for writ of certiorari was filed in the United States Supreme Court, but said petition was denied on May 22, 1967. *Brown v. Indiana*, 387 U.S. 925 (1967). A subsequent petition for rehearing filed with the same court was also denied. *Brown v. Indiana*, 389 U.S. 891 (1967).

On October 23, 1967, the Lake Criminal Court fixed petitioner's date of execution for February 5, 1968.

The petition for writ of habeas corpus presently before this Court was filed on December 29, 1967. Petitioner was granted leave to proceed *in forma pauperis* and an Order staying the execution of sentence was entered on the same date. Petitioner is represented by the same counsel that has represented him in prior proceedings by virtue of an Order of the Lake Criminal Court entered in May of 1963.

The Court having ruled against the petitioner as to several of the issues raised in his petition at the time of oral argument on May 23, 1968, only two issues now remain for consideration and disposition:

(1) Was petitioner denied due process of law as guaranteed by the 6th and 14th Amendments by reason of the incompetency of counsel at the June 1, 1960, hearing on petitioner's petition for writ of error coram nobis?

(2) Did the challenge for cause of the prospective jurors, because of their stand on capital punishment, satisfy the requirements annunciated in Witherspoon v. Illinois?

I—COMPETENCY OF COUNSEL ISSUE

A two-day evidentiary hearing was held in this Court on March 6th and 7th, 1968, on the issue of the competency of counsel at the hearing in Lake Criminal Court on the petition for writ of error coram nobis[1] of June 1, 1960. The petitioner was represented at the coram nobis hearing by the then Indiana Public Defender, Robert Baker, who is now deceased and thus was not available to testify at the evidentiary hearing. We do, however, have the benefit of the deposition of Thomas Hondley who was the Deputy Public Defender of Indiana at the time in question, and who worked with and was familiar with what the deceased Robert Baker did regarding the George Robert Brown case.

The petitioner claims that the Public Defender denied him the effective assistance because of the manner in which he handled the coram nobis hearing. In particular, the petitioner contends that his right to effective counsel was denied him at his coram nobis hearing because of the Public Defender's failure to interview or subpoena certain witnesses who allegedly would have substantiated his claim that his confession was obtained involuntarily. Petitioner further claims that the Public Defender did not adequately interview and discuss the matters to be presented at the coram nobis hearing with him before embarking on the presentation of these matters to the Lake Criminal Court

[1]Actions for writs of error coram nobis were abolished in 1963 and replaced by a motion for new trial. See Rule 2-40, Indiana Supreme Court, as amended September 11, 1963.

on June 1, 1960. In order to prove these allegations, petitioner attempted to show at the March 6th and 7th, 1968, evidentiary hearing in this Court the facts and circumstances surrounding the acquisition of petitioner's confession and that such facts and circumstances could and should have been adduced by counsel who acted in a competent and effective manner. As to this issue, it is clear that petitioner has exhausted his state court remedies, for the Indiana Supreme Court decided against him on this issue. *Brown v. State*, 221 N.E. 2d 676, 681 (1966).

The respondent relies principally on the testimony of Thomas Hoadley, as given in his deposition, in arguing that petitioner's coram nobis counsel acted in as effective and in as competent a manner as is required under the due process clause of the 14th Amendment of the United States Constitution.

The deposition of Thomas Hoadley shows that Robert Baker prior to representing the petitioner at the June 1, 1960, coram nobis hearing, had been engaged in the private practice of law for several years, had been a prosecuting attorney for four terms, was later a Judge of the LaPorte Superior Court, worked in the Criminal Appeals Division of the Indiana Attorney General's office, and was appointed Public Defender of Indiana on January 1, 1957. (Hoadley's Dep., p. 5).

The testimony of Thomas Hoadley, as given in his deposition, goes into rather extensive detail as to the conduct and preparation of Mr. Baker regarding the George Robert Brown case. (Hoadley Dep., pp. 6-31; see also pp. 6-11 of respondent's posthearing brief filed May 6, 1968). Hoadley summarized the Public Defender's activities in preparing for the petitioner's coram nobis hearing as follows:

> . . . we had followed the case from the inception in the newspaper, we worked closely with it as counsel after the trial up through the legal proceedings, and the Indiana Supreme Court, we followed the case through the Federal Courts, we researched the various legal propositions he had raised. During the course of his pursuit of his post-conviction remedies, we had talked to his attorney and the various people in Lake County on several occasions about the allegations he had made. It was our position that all the evidence available was to be introduced at the hearing so that a complete review of the evidence could be made by the Judge. We felt like Mr. Brown fully informed us of every one of his complaints, both from our two visits with him, from various papers and memorandums he had given us and his 25 pages of writ of error coram nobis. We felt like it was our position that we were as well aware of the facts of the case as possible. (Hoadley Dep., pp. 29-30).

The standards which are utilized to judge whether the actions or inactions of counsel in a particular case constitute ineffective and incompetent representation in violation of the due process clause of the 14th Amendment are well settled and not in dispute in the case at bar. In *United States v. Dilella,* 354 F.2d 584, 587 (7th Cir., 1965), the Court said:

> The constitutional guarantee of the assistance of competent, effective counsel does not require perfection. That guarantee is satisfied when the conduct of counsel is such that the essential integrity of the proceedings as a trial is preserved and the trial has not made a travesty of justice.
>
> Errors of judgment of counsel, if any, whether of omission or commission, do not constitute a deprival of effective representation within the constitutional concept. (Citations omitted.)

When considering the actions and inactions of petitioner's coram nobis counsel, Mr. Baker, we find that although there may have been more that could have been done in preparing for the hearing, what was done was sufficient to satisfy the requirements of due process of law. By the use of hindsight, one can inevitably re-examine the manner in which counsel presented a particular case and criticize and speculate as to how the matter could or should have been more advantageously presented. This, however, is not the process or standard to be used in judging the competency of counsel in the due process and constitutional sense. *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir., 1960). Before a finding can be made that one was deprived of competent and effective counsel in the due process or constitutional sense, the trial or proceeding must be such as to reduce it to a farce, a sham, or a travesty of justice.[2] The facts in this case at bar clearly show that the conduct of the Public Defender was not such as to reduce the coram nobis hearing to a farce, a sham, or a travesty of justice.

The courts have further held that "whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent the defendant, the presumption is that such counsel is competent." *United States v. Ragen*, 166 F.2d 976, 980 (7th Cir., 1948); also see *Busby v. Holman*, 356 F.2d 75 (5th Cir., 1966) and *United States ex rel Weber v. Ragen*, 176 F.2d 579 (7th Cir., 1949). There can be no doubt that petitioner's counsel, Mr. Baker, was a well qualified and experienced attorney who was fully capable of rendering—and did render—the representation to which the petitioner was entitled.

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[2]*Feeley v. Ragan*, 166 F.2d 976 (7th Cir., 1948); *Lunce v. Overlade*, 244 F.2d 108, 110 (7th Cir., 1957); *Lunch v. Dowd*, 261 F.2d 351, 354 (7th Cir., 1958).

Petitioner having failed to sustain his burden of proof on the issue of incompetency of counsel, his allegation as to the same provides no basis for granting his petition for writ of habeas corpus.

II—EXCLUSION OF JURORS ISSUE

The voir dire examination of prospective jurors was conducted on December 2nd, 3rd, 4th, 5th, 6th and 9th of 1957, preceding the actual trial of petitioner for first degree murder in the perpetration of a robbery in Lake Criminal Court, Crown Point, Indiana. Of the 58 prospective jurors examined, 21 were challenged for cause by the State and excused by the Court for their stand on capital punishment. The apparent basis of the challenge for cause of these veniremen was an Indiana statute, Burns' Ind. Stat. § 9-1504, which reads in pertinent part as follows:

> The following shall be good causes for challenge to any person called as a juror in any criminal trial:
>
> * * * * *
>
> Third. If the offense charged be punishable with death, that he entertains such conscientious opinions as would preclude his affixing the death penalty if the defendant should be found guilty.

On December 13, 1957, the jury returned into open court with a verdict finding the petitioner guilty as charged in the indictment and that he suffer death. The Lake Criminal Court entered judgment on the verdict and sentenced petitioner to death by electrocution.

Although the respondent previously filed a motion for summary judgment contending that petitioner had failed to exhaust his state remedies as to this issue and although this Court denied the motion on March 6th, 1968, the intervening Supreme Court decision in *Witherspoon v. Illinois*, 391

U.S. 510 (1968) has now unsettled an area of Indiana law which heretofore had been well settled. For this reason we do not now believe that petitioner's resort to available state remedies would be futile or inadequate. This is especially so in light of *Hathway v. State*, 241 N.E. 2d 240 (1968).

The decisions in several Indiana cases which have interpreted and applied the above statute may be jeopardized and affected by the *Witherspoon v. Illinois, supra*, decision.[3] Even though petitioner has left behind him an extensive history of proceedings in various courts, the principles of comity demand in a case such as this that we afford to the state courts the first opportunity to determine the effect of the Witherspoon decision on the issue raised by this petitioner, on the Indiana statute relating to the exclusion of jurors for their stand on capital punishment, and on existing Indiana case law regarding the same.

It is well settled that 28 U.S.C. § 2254 requires a petitioner to raise the questions and issues presented in his petition in the state courts by any available and adequate procedure. *Fay v. Noia*, 372 U.S. 391, 419-420, 435 (1963); *United States v. Pate*, 354 F.2d 588 (7th Cir., 1965); *U. S. ex rel Sproch v. Ragen*, 246 F.2d 264, 266 (7th Cir., 1957). The Court will not rule on the merits of this issue until there has been compliance with the requirements of this statute by first presenting this issue to the courts of the State of Indiana.

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[3]*Gross v. State*, 2 Ind. 329 (1850); *Driskill v. State*, 7 Ind. 338 (1855); *Fahnestock v. State*, 23 Ind. 231 (1864); *Greenley v. State*, 60 Ind. 141 (1877); *Stephenson v. State*, 11 N.E. 360 (1887); *Davidson v. State*, 34 N.E. 972 (1893); *Coppenhaver v. State*, 67 N.E. 453 (1903); *Smith v. State*, 74 N.E. 983 (1905).

FILED
JAN 29 1971

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1036

RUSSELL LASH, as Warden of the Indiana State Prison, Petitioner-Appellant, v. GEORGE ROBERT BROWN, Respondent-Appellee.	On petition for a writ of certiorari to United States Court of Appeals for the Seventh Circuit and cross-petition for a writ of certiorari to United States Court of Appeals for the Seventh Circuit.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is set out in petitioner's appendix (A1-A14). The opinion of the District Court for the Northern District of Indiana is also set out in petitioner's appendix (A15-A24).

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1970; the petition for writ of certiorari was filed on December 1, 1970. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

(A)

ON PETITIONER'S PETITION FOR WRIT OF CERTIORARI

1. Whether the Court of Appeals properly remanded the cause to the District Court for an evidentiary hearing on the voluntariness of

respondent's confession under the provisions of 28 USC 2254 (d).

(B)

ON RESPONDENT'S CROSS-PETITION
FOR WRIT OF CERTIORARI

1. Whether the Court of Appeals erred in holding that respondent was not denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States at his post-conviction coram nobis hearing held before the Lake Criminal Court on June 1, 1960.

2. Whether the determination of guilt and penalty in one trial violates the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

3. Whether the imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the imposition of the death penalty without standards to guide the jury violates the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals declined to rule upon issues (2) and (4), noting that this Court has granted certiorari in cases involving those issues (petitioner's appendix, page 12). The Court of Appeals did not rule upon issue (3).

STATEMENT

Respondent, hereinafter referred to as the defendant, was convicted of first degree murder on December 13, 1957, after trial by

jury in the Lake Criminal Court and was sentenced to death. The conviction was affirmed in Brown v. State (1958) 239 Ind. 184, 154 N.E. 2d 720. Certiorari was denied without prejudice to application for writ of habeas corpus, 361 U.S. 936. An application to the District Court was dismissed (1960) for failure to exhaust State remedies. Defendant then filed a petition for writ of ergor coram nobis in the Indiana trial court. It was denied. The State public defender who had appeared for him at the coram nobis hearing refused to obtain a transcript or assist in an appeal and the State trial and Supreme Courts denied a transcript and appointment of other counsel. Brown v. State (1961) 241 Ind. 298, 171 N.E. 2d 825, cert. denied without prejudice 366 U.S. 954. Defendant obtained a federal order requiring his release, unless the State provided him an appeal. Brown v. Lane D.C. Ind. (1961) 196 Fed. Supp. 484, Brown v. Lane 7th Cir. (1962) 302 Fed. 2d 537, Lane v. Brown (1963) 372 U.S. 477, 9 L. Ed 2d 892. Present counsel for defendant was then appointed by the trial court.

The denial of the coram nobis petition was later affirmed, Brown v. State (1966) 221 N.E. 2d 676, cert. denied 387 U.S. 925, rehearing denied 389 U.S. 891. The petition for writ of habeas corpus, now under consideration, was filed on December 29, 1967. The petition was submitted to the District Court on March 6 and 7, 1968, and on February 20, 1969 the District Judge denied the petition.

The petitioner's statement that the writ of habeas corpus raised only two issues, (1) incompetency of counsel in the coram nobis proceeding and (2) the death penalty had been unconstitutionally imposed because jurors conscientiously opposed to the death penalty were removed for cause, the imposition of the death penalty without guides or standards, and the imposition of the death sentence as constituting cruel and unusual punishment, is manifestly incorrect (petitioner's brief, page 5).

The enumeration of those issues raises four distinct issues. In addition to those issues, there was submitted to the District Court for consideration and decision the issue of the single trial procedure, whereby the same jury determines guilt and penalty. The petition for writ of habeas corpus did raise as an issue the involuntariness of the defendant's confession. This issue was raised in conjunction with the issue of the competency of counsel. Rhetorical paragraphs 26 and 27 on page 5 of the petition for the writ of habeas corpus clearly demonstrate this. They are as follows:

> (26) "Petitioner avers that his detention by the respondent and the proposed execution of the petitioner unlawfully deprive him of his life and liberty in that the judgment of conviction resulting in the imposition of the death sentence was obtained in violation of petitioner's constitutional rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States and in violation of his constitutional rights under the Sixth Amendment to the Constitution, guaranteeing the effective assistance of counsel as will hereinafter be set out.
>
> (27) "The confession which your petitioner alleges was involuntary and obtained in violation of his constitutional rights was dated April 29, 1957, 8:00 p.m., and is appended hereto as petitioner's exhibit 1 . . ." (Appendix, page 5)

The District Court had ruled against the defendant as to the other issues raised in his petition at the time of oral argument on May 23, 1968 (petitioner's appendix, page A18).

In its opinion, the Court of Appeals affirmed the decision of the District Court on the competency of counsel issue and on the Witherspoon issue. The Court of Appeals did not pass upon the single trial procedure issue, the lack of adequate standards issue, and the death penalty as constituting cruel and unusual punishment issue.

The Court of Appeals remanded the cause to the District Court for a new evidentiary hearing on the issue of the voluntariness of defendant's confession, relying upon 28 USC 2254 (d) and the case authority of Townsend v. Sain (1963) 372 U.S. 293, 9 L. Ed 2d 770. (opinion of the Court of Appeals, petitioner's appendix, page A10)

ARGUMENT IN OPPOSITION TO THE GRANTING OF PETITIONER'S WRIT OF CERTIORARI

The argument of the petitioner that the Court of Appeals exceeded its authority when it remanded the cause to the District Court on an issue never presented by either of the parties to the District Court or the Court of Appeals is not supported by the record. As has been previously noted, the writ of habeas corpus did allege that the confession obtained from the defendant was involuntary (writ of habeas corpus, rhetorical paragraphs 26 and 27, appendix page 5).

The issue of the voluntariness of the confession was submitted in conjunction with the issue of competency of counsel. This is clearly demonstrated by the allegations in the writ, particularly, where it is alleged that the confession was obtained from the defendant as a result of prolonged custodial interrogation; that newly discovered evidence would establish that defendant had been threatened by a deputy sheriff; that deputy sheriffs knowingly and wilfully testified falsely under oath concerning the circumstances under which the confession was obtained; that the deputy sheriffs wilfully conspired with each other to defeat the defendant's constitutional rights as guaranteed by the Fourteenth Amendment by suppressing evidence favorable to the

defendant and by giving perjured testimony on the hearing on the petition for writ of error coram nobis. (writ of habeas corpus, appendix, pages 7, 8) The issue of the voluntariness of the confession was, therefore, implicit in the issue of competency of counsel and was inextricably interwoven with the submission of the issue of competency of counsel.

The briefs of defendant's counsel which were submitted to the trial court, both before the evidentiary hearing and after the evidentiary hearing, conclusively show that this issue was submitted to the trial court, as well as the Court of Appeals. In the brief that was submitted to the trial court following the evidentiary hearing, there is a section headed "Discussion of the Evidence to Substantiate Petitioner's Contention that the Confession was Involuntary". Twenty-one pages are devoted to that subject. Immediately following that heading, there is the following heading in the trial brief "Correlation of the Testimony to the Issue of the Lack of Effective Assistance of Counsel". (Supplemental memorandum brief in support of petition for writ of habeas corpus, pages 6-27)

The brief of the defendant in the Court of Appeals devotes some twenty-four pages to the facts and circumstances surrounding the obtaining of the confession of the defendant (defendant's brief, pages 10-34). That discussion is preceded by the following statement in the brief:

> "Petitioner's claim that he was denied the effective assistance of counsel at his coram nobis hearing is inextricably interwoven with the issue of the voluntariness of petitioner's confession. The evidentiary hearing on the habeas corpus petition, therefore, centered about the facts and circumstances surrounding the procurement of petitioner's confession which was introduced into evidence at his trial in the Lake Criminal Court in December of 1957 and without which no conviction could have been obtained. . . ." (defendant's brief in the Court of Appeals, page 10)

As noted by Judge Fairchild in the opinion of the Court of Appeals, the ultimate constitutional issue raised by the defendant is whether his will was overborne and his confession involuntary (petitioner's appendix, A9).

The relief accorded the defendant by the Court of Appeals is clearly within the purview of the provisions of 28 USC 2254 (d). Judge Fairchild based the granting of relief upon the provision found in subsection (3) of 2254:

> "That the material facts were not adequately developed at the State Court hearing; . . .

This is precisely what the defendant contended in the trial court and in the Court of Appeals under the issue of competency of counsel. The defendant contended time and time again that had he been granted the effective assistance of counsel, material facts could have and would have been adduced on the coram nobis hearing to support his claim that his confession was involuntary. All of the testimony adduced by the defendant and which is summarized by Judge Fairchild under six different headings compels the conclusion that "the material facts were not adequately developed at the State Court hearing".

This Court, in Townsend v. Sain (1963) 372 U.S. 299, 9 L. Ed 2d 770, in discussing the kind of newly discovered evidence which would permit the re-opening of a judgment, stated:

> "If, for any reason not attributable to the inexcusable neglect of petitioner . . ., evidence crucial to the adequate consideration of a constitutional claim was not developed at the State hearing, a federal hearing is compelled". (at page 313)

Whether the issue was presented to the trial court and the Court of Appeals under the heading of competency of counsel or expressly under the terms of 2254 is not significant; under the evidence that was adduced

at the trial the provisions of 2254 were clearly applicable. The petitioner tacitly concedes this by the statement in his brief:

> "If it could have been considered as having been indirectly raised by way of a competency issue, the Court of Appeals was required to find that the facts were adequately developed in the State Courts . . ." Petitioner's brief, page 9.

This Court has frequently disposed of cases by deciding crucial issues which the parties themselves fail to present. United Brotherhood of Carpenters, et al. v. U.S., 330 U.S. 395, 91 L. Ed 973, Silber v. U.S. 370 U.S. 717, 8 L. Ed 2d 798, Boynton v. Virginia 364 U.S. 454, 81 S. Ct 182, 5 L. Ed 2d 206.

In Boulden v. Holman (1969) 89 S. Ct 1138, although the Witherspoon issue was not raised in the District Court, the Court of Appeals, or even in the petition for writ of certiorari, this Court, sua sponte, considered the issue for the first time in oral argument and remanded the cause to the District Court for consideration of the Witherspoon issue.

The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned or put to death. If for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity for obtaining judicial relief. Townsend v. Sain, (supra).

It is respectfully submitted that the petitioner's petition for a writ of certiorari should be denied.

ARGUMENT IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

I

THE COURT OF APPEALS ERRED IN HOLDING RESPONDENT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CORAM NOBIS HEARING

The facts adduced at the evidentiary hearing to sustain this contention of the defendant are extensively discussed in the defendant's brief in the Court of Appeals (brief, page 19-36).

The evidence which was adduced at the evidentiary hearing is succinctly summarized by Judge Fairchild under the heading of New Evidence in the opinion of the Court of Appeals (petitioner's appendix, page A5-A9).

The single, most compelling item of evidence, however, to support the defendant's claim as to the issue of competency of counsel is the uncontroverted fact that the only time the defendant's counsel talked to him in connection with the coram nobis petition was shortly before the submission of the coram nobis petition on June 1, 1960.

The preparation of the public defender consisted of some discussions with the persons least likely to support the defendant's claim that his confession was involuntary and who were, by virtue of their position, hostile to the defendant's claim. One would not expect a sheriff, whose deputies have been accused of coercing a confession from the defendant, to provide any support to that contention.

One would not expect the prosecuting attorney, who had tried the case and obtained the conviction, to come forward with any evidence to support the defendant's claim that his confession was involuntary.

One would not expect the defendant's trial counsel, who had been charged with incompetency by the defendant, to admit that he

was incompetent in the trial of the case by not making inquiry into the facts and circumstances surrounding the obtaining of the defendant's confession.

One would not expect that the deputy sheriffs who had coerced the confession from the defendant and who had threatened the defendant to come forward at the coram nobis hearing and admit their misconduct.

One would expect competent counsel to interview the defendant in detail concerning the circumstances that surrounded the obtaining of the confession. One would expect competent counsel, on the basis of such a detailed interview, to pursue the investigative leads that such an interview would have supplied. One would expect competent counsel to seek to corroborate the allegations of the defendant from the only conceivable source - - fellow inmates of the defendant at the time the confession was obtained.

It would be incredibly naive to expect the trial court hearing the petition for writ of error coram nobis to sustain that petition upon the naked, uncorroborated testimony of the defendant. That hearing, therefore, was a mere ritual, a farce, the result of which was pre-ordained. The conduct of the public defender is clearly within the interdiction laid down by this Court in Avery v. Alabama (1940) 308 U.S. 44, 60 S. Ct 321 and Powell v. Alabama (1932) 287 U.S. 45, 53 S. Ct 55.

II

THE COURT OF APPEALS ERRED IN DECLINING TO RULE THAT THE SINGLE TRIAL PROCEDURE WHEREBY THE DETERMINATION OF GUILT AND PENALTY IS MADE BY THE SAME JURY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

III

THE COURT OF APPEALS ERRED IN DECLINING TO RULE WHETHER THE IMPOSITION OF THE DEATH PENALTY WITHOUT ADEQUATE STANDARDS TO GUIDE THE JURY VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

The opinion of the Court of Appeals, while noting that these two issues have been raised, did not pass upon them. The opinion notes that this Court has granted certiorari in cases involving those issues. Crampton v. Ohio (1969) 18 Ohio St. 2d 182, 248 N.E. 2d 614, cert. granted 398 U.S. 936, McGautha v. California (1969) 70 Cal. 2d 770, 452 Pac. 2d 650, cert. granted 398 U.S. 936. Since this Court has already granted certiorari in other cases involving these identical issues and these issues have been properly raised in the instant proceeding, no good reason exists why this Court should not grant certiorari in this matter. A favorable resolution to either of these issues by this Court would eliminate the necessity of the evidentiary hearing ordered by the Court of Appeals.

As noted by Judge Fairchild, these issues are highlighted because of the mass of evidence of other offenses which was before the jury. This evidence was held competent since the defendant had raised the issue of insanity. The defense of insanity failed but the evidence of other offenses may well, it seems, have affected the jury's choice of the death penalty. It is true, of course, that other offenses committed by a convicted person normally are considered in fixing the penalty. Usually, however, these matters are separately considered at a stage where the accused may speak in answer without waiving his right of silence before verdict of guilt. (Opinion of Court of Appeals, petitioner's appendix A12-13)

IV

THE COURT OF APPEALS ERRED IN DECLINING TO RULE WHETHER OR NOT THE IMPOSITION OF THE DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The Eighth Amendment prohibition against cruel and unusual punishment is applicable to the States through the Fourteenth Amendment. Robinson v. California (1962) 370 U.S. 660, 82 S. Ct 1417.

The last time this Court has had occasion to consider this argument, it has rejected it. Louisiana ex rel, Francis v. Reswebber (1947) 329 U.S. 459, 67 S. Ct 374.

What constitutes cruel and unusual punishment is not a fixed concept. As this Court has observed

> "the amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. . . . the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has power to punish, the Amendment stands to assure that this power is exercised within the limits of civilized standards . . ." Trop v. Dulles (1957) 356 U.S. 86, 100, 101, 78 S. Ct 590, 597, 98.

It is time that this Court re-examined its prior holdings with respect to this issue. A civilized society which places a premium upon the life and dignity of man should no longer permit the ultimate degradation of man by man - - legalized murder - - to be permissible.

CONCLUSION

This defendant is now commencing his fourteenth year in "death row". The evidence adduced at the habeas corpus hearing compels the conclusion that the confession that was wrung from

him was coerced. The judgment of the Court of Appeals merely accorded this defendant minimal relief by ordering a new evidentiary hearing on the issue of the voluntariness of the confession. On the basis of the record that was before the Court of Appeals, it is submitted that that Court could very well have held the confession to be involuntary and ordered a new trial in the State Court. The question of an evidentiary hearing on the voluntariness of the confession could very well be rendered moot, should this Court grant a cross-petition for certiorari and ultimately declare that the unitary trial procedure followed by the State of Indiana necessitates the grant of a new trial. Since this Court has already granted certiorari on that issue, as well as the issue of a lack of adequate standards to guide the jury, the cross-petition for certiorari should be granted.

Respectfully submitted,

MAX COHEN
Attorney for Respondent
504 Broadway, Gary, Indiana
Phone: (219) 886-3505

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

GEORGE ROBERT BROWN, Petitioner,	)	
VS.	)	NO._____
WARD LANE, Warden of the Indiana State Penitentiary, Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

Comes now the petitioner by his attorney and petitions this Court to issue a writ of habeas corpus against the respondent herein and in support of said petition alleges and says:

1. Your petitioner alleges that he is unlawfully detained and deprived of his liberty by the respondent herein and has so been detained and deprived of his liberty since December 13, 1957.

2. Petitioner is presently confined in the Indiana State Penitentiary awaiting execution as a result of a judgment of conviction of murder in the Lake Criminal Court on December 13, 1957.

3. Following said judgment of conviction petitioner was sentenced to death in the electric chair. A direct appeal to the Supreme Court of Indiana was perfected by court appointed counsel, to-wit: T. C. Stenhouse and John Stanton and the Supreme Court of Indiana affirmed the judgment of conviction. The opinion is reported in Brown v. State (1958) 239 Ind. 184, 154 N.E. 2d 720.

4. A petition for writ of certiorari was filed in the United States Supreme Court and denied without prejudice to petitioner's right to file a writ of habeas corpus, Brown v. State (1960) 361 U.S. 936, 80 S.Ct. 375. Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana which was dismissed in 1960 on the ground that petitioner had failed to exhaust his state remedies.

5. On May 10, 1960, the petitioner pro se filed his petition for writ of error coram nobis in the Lake Criminal Court.

6. On June 1, 1960, a hearing was held on this petition in the Lake Criminal Court, the Honorable Floyd S. Draper presiding, and the petition was denied. The Public Defender, Robert S. Baker, declined to appeal the ruling of the Lake Criminal Court denying the petition for writ of error coram nobis.

7. Petitioner thereafter filed his request for a transcript and court appointed counsel at public expense. This petition was denied by the trial court and the Supreme Court of Indiana affirmed the denial of petitioner's request in Brown v. State (1961) 241 Ind. 298, 171 N.E. 2d 825.

8. Petition for writ of certiorari was filed in the United States Supreme Court and denied without prejudice, Brown v. State (1961) 366 U.S. 954, 81 S.Ct. 1906.

9. Petitioner then filed his petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana, South Bend Division. The writ was granted, U. S. v. Lane (1961) 196 F. Supp. 484. The order granting the writ provided that petitioner be given a full appellate review of the denial of his petition for writ of error coram nobis within ninety days or such additional time as the court might thereafter determine. The order further provided that should the State fail to provide such a review petitioner was to be discharged from custody.

10. The Court of Appeals affirmed the District Court directing, however, that petitioner continue to be held in custody pending final disposition of the case by the United States Supreme Court, Brown v. Lane (1962) 302 F. 2d 537.

11. The United States Supreme Court vacated the judgments of the Court of Appeals and the District Court so that appropriate orders could be entered ordering petitioner's discharge from custody unless, within a reasonable time, the State of Indiana provided him an appeal on the merits to the Supreme Court of Indiana from the denial of the petition for writ of error coram nobis, Lane v. Brown (1963) 372 U.S. 477, 83 S.Ct. 768.

12. Pursuant to the mandate of the United States Supreme Court the Supreme Court of Indiana ordered the Lake Criminal Court to provide petitioner with a transcript and to appoint counsel to conduct the appeal from the denial of the petition for writ of error coram nobis.

13. On May 13, 1963, present counsel was appointed by the Lake Criminal Court to perfect the appeal.

14. On September 23, 1963, petitioner's court appointed counsel filed a petition for rehearing on the petition for writ of error coram nobis.

15. On December 13, 1963, the State of Indiana filed its motion to strike the petition for rehearing on the petition for writ of error coram nobis in its entirety.

16. On December 30, 1963, the Lake Criminal Court sustained the motion to strike the petition for rehearing and no further proceedings were had in the Lake Criminal Court.

17. In January of 1965 petitioner's court appointed counsel perfected the appeal from the denial of the petition for writ of error coram nobis and filed in the Supreme Court of Indiana his brief.

18. On March 15, 1965, the State of Indiana filed its brief in opposition to petitioner's brief.

19. On December 6, 1966, the Supreme Court of Indiana affirmed the judgment of the Lake Criminal Court denying the petition for writ of error coram nobis, Brown v. State (1966) 221 N.E. 2d 676.

20. Appropriate extensions having been granted by the United States Supreme Court, petitioner then filed his petition for writ of certiorari on April 1, 1967.

21. On April 27, 1967, the State of Indiana filed its brief in opposition to the petition for writ of certiorari.

22. On May 22, 1967, the United States Supreme Court in a formal order without opinion denied the petition for writ of certiorari.

23. On June 8, 1967, petitioner filed his petition for rehearing of the order denying certiorari in the United States Supreme Court.

24. On October 9, 1967, the United States Supreme Court without opinion entered a formal order denying the petition for rehearing.

25. On October 23, 1967, the Lake Criminal Court upon petition filed by the Prosecuting Attorney fixed the date of execution of the petitioner as February 5, 1968.

26. Petitioner avers that his detention by the respondent and the proposed execution of the petitioner unlawfully deprive him of his life and liberty in that the judgment of conviction resulting in the imposition of the death sentence was obtained in violation of petitioner's constitutional rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States and in violation of his constitutional rights under the Sixth Amendment to the Constitution guaranteeing the effective assistance of counsel as will hereinafter be set out.

27. The confession which your petitioner alleges was involuntary and obtained in violation of his constitutional rights was dated April 29, 1957, 8:00 P. M. and is appended hereto as Petitioner's Exhibit I.

28. When the confessions were offered into evidence no objection was made by petitioner's trial counsel on the ground that the confessions were involuntary nor did the petitioner's trial counsel at any stage in the proceedings question the voluntariness of said confessions.

29. On the direct appeal following the judgment of conviction no issue was raised as to the voluntariness of the confessions.

30. Petitioner first asserted as grounds for reversal the involuntariness of the confessions in his petition for writ of error coram nobis filed pro se; said petition was filed on May 10, 1960. At the time said petition was filed petitioner was confined in Death Row at the Indiana State Penitentiary at Michigan City, Indiana. Petitioner had no counsel to assist him in the drafting of said petition nor did he have funds with which to employ counsel or an investigator to substantiate the factual allegations in his petition that the confession was involuntary.

31. The hearing on the petition for writ of error coram nobis was held on June 1, 1960. The Public Defender who represented petitioner at the hearing did not confer with the petitioner, did not revise in any way the petition for writ of error coram nobis and did not interview or attempt to interview or subpoena any witnesses to substantiate petitioner's claim between the time that petitioner filed his petition and the hearing. The only contact petitioner had with the Public Defender was on the morning of the hearing when the Public Defender asked petitioner if he wished to represent him in the hearing. Petitioner's counsel made no request for a continuance and did not appear for the petitioner in the coram nobis proceeding until June 1, 1960.

32. On the coram nobis hearing petitioner was accorded only perfunctory and pro forma representation by the Public Defender and thus deprived of the effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution of the United States.

33. Petitioner avers that had he been provided the effective assistance of counsel in the preparation of the petition for writ of error coram nobis and in the presentation of said petition petitioner could have and would have produced compelling and affirmative evidence that the confession obtained from him was obtained as a result of prolonged custodial interrogation extending over a period of five to seven days. Investigation by present counsel has ascertained the following facts in connection with petitioner's confession:

a. Custodial interrogation of the petitioner commenced on or about April 22, 1957.

b. Newly discovered evidence has been obtained which will substantiate petitioner's claim that he was threatened by a Deputy Sheriff who stated to petitioner that he was a relative of the decedent prior to the time petitioner confessed; that petitioner can produce at this time independent evidence that the threat was made and that the Deputy Sheriff removed petitioner from his cell and forced him to remove his clothing.

c. The Deputy Sheriffs who interrogated the petitioner knowingly, wilfully and falsely testified under oath that petitioner's confession was obtained from him on April 29, 1957, at 8:00 P. M., when in fact said confession was not obtained from him until the late afternoon or evening hours of April 30, 1957.

d. The Deputy Sheriffs who interrogated the petitioner knowingly testified falsely as to the date on which attention was focused on petitioner as a suspect in the murder herein involved. Said Deputy Sheriffs have further testified falsely under oath as to when the custodial interrogation of the petitioner commenced.

e. That said Deputy Sheriffs knowingly and wilfully conspired with each other to defeat the petitioner's constitutional rights as guaranteed by the Fourteenth Amendment by suppressing evidence favorable to the petitioner and by giving perjured testimony on the hearing on the petition for writ of error coram nobis. Said Deputy Sheriffs knew that petitioner had been threatened by a Deputy Sheriff yet wilfully gave false testimony on the hearing on the petition for writ of error coram nobis when questioned about the same. The suppression of said evidence and the false testimony given by said Deputy Sheriffs deprived petitioner of due process of law as guaranteed by the Fourteenth Amendment.

34. That all of the above and foregoing information was readily available and ascertainable to petitioner's coram nobis counsel; that had petitioner's coram nobis counsel rendered petitioner the effective assistance of counsel petitioner's writ of error coram nobis would have or should have been sustained.

35. Petitioner further avers as cause for sustaining this writ that the exclusion in his trial for cause of prospective jurors who entertained conscientious scruples against the death penalty violated the due process and equal protection clauses of the Fourteenth Amendment and further

violated his constitutional right to a fair trial by an unbiased jury as guaranteed by the Seventh Amendment; that the jury and judge which imposed a death penalty upon petitioner did so without guides or standards of any kind and thus violated petitioner's constitutional rights as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment; that the sentence of death constitutes a cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States and the due process clause of the Fourteenth Amendment to the Constitution of the United States in that there are no standards to guide judges and juries; that the State of Indiana does not provide an adequate procedure to determine whether a death penalty is justifiable in any particular case and the manner of capital punishment's application in Indiana inflicts the loss of life without commensurate justification.

36. In support of this ground petitioner avers that he was convicted of murder in the perpetration of a robbery to which he entered a plea of not guilty by reason of insanity. The trial commenced on December 2, 1957, at which time impaneling of a jury to qualify for the death penalty commenced. The transcript does not contain the voir dire examination of the prospective jurors. Petitioner avers nonetheless that all prospective jurors who expressed conscientious scruples against the death penalty were challenged for cause. The jury which ultimately tried and convicted the petitioner was not impaneled and sworn until

December 9, 1957. On December 13, 1957, the jury returned a verdict of guilty as charged in the indictment and that the petitioner suffer death.

37. No objection was made to the exclusion of jurors who entertained conscientious objections to the death penalty for the reason that Indiana has uniformly held that such conscientious objection to the infliction of the death penalty is legal ground for cause.

38. Prospective jurors so excluded for scruples to infliction of the death penalty were excluded without inquiry into whether their scruples would affect their impartiality as to the guilt of the petitioner.

39. Petitioner further avers as ground for sustaining this writ that he was compelled to submit to trial by jury. Petitioner had prior to trial expressly waived a jury trial. The State of Indiana, however, demanded a jury trial and the court granted the demand of the State. Petitioner asserts that he has a constitutional right not to be tried by a jury; that particularly in the case at bar, due to the circumstances attendant upon the commission of the alleged crime, the imposition of the death penalty by a jury was a foregone conclusion; that the action of the trial court in granting the State a jury trial subjected the petitioner to the inflamed wrath and passion of a jury in lieu of permitting him to be tried in the more dispassionate atmosphere that surrounds a bench trial.

40. Petitioner further avers as ground for sustaining this writ that the imposition of the death penalty, which is provided for by the laws of the State of Indiana, deprives petitioner of equal protection of the laws in this: That many states of the union have abolished the death penalty; that the continued imposition of the same by the State of Indiana exposes the petitioner to greater punishment for conduct which if committed by citizens of other states in which the death penalty has been abolished would result only in imprisonment.

41. Petitioner has exhausted all of his state court remedies by virtue of the fact that the Lake Criminal Court denied his petition for rehearing on the petition for writ of error coram nobis; that following said denial the Supreme Court of Indiana affirmed the Lake Criminal Court; that the United States Supreme Court has denied a petition for writ of certiorari and a petition for rehearing of the order denying the petition for writ of certiorari.

42. This petition for writ of habeas corpus is brought under the provisions of 28 U.S.C. Section 2254 and petitioner avers that he has satisfied all requirements as to the exhaustion of state remedies prior to the commencement of this action.

WHEREFORE, petitioner prays:

1. That this Court issue an order to show cause to the respondent herein why a writ of habeas corpus should not issue as prayed for.

2. That a writ of habeas corpus issue for the purpose of inquiring into the cause of imprisonment and restraint.

3. That the Court permit petitioner to submit evidence to substantiate the allegations in his petition for writ of habeas corpus.

4. That pending the determination of this petition for writ of habeas corpus this Court issue a stay of execution.

5. That in the event the petition be determined adversely to petitioner the stay of execution continue until full appellate review of this Court's ruling is had.

6. Or for such other relief as the Court may deem just and proper.

MAX COHEN
ATTORNEY FOR PETITIONER

STATE OF INDIANA)
)SS:
COUNTY OF LAKE)

I have read the above and foregoing Petition for Writ of Habeas Corpus and the matters and facts alleged therein are true to the best of my knowledge, information and belief.

George Robert Brown
GEORGE ROBERT BROWN, PETITIONER

Subscribed and sworn to before me, a Notary Public, this 20 day of December, 1967.

Max Cohen
NOTARY PUBLIC

MY COMMISSION EXPIRES:
July 13, 1968

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FEB 25 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 1036

RUSSELL LASH, as Warden of the Indiana State Prison,

Petitioner,

vs.

GEORGE ROBERT BROWN,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI, AND RESPONSE IN OPPOSITION TO RESPONDENT'S CROSS-PETITION FOR WRIT OF CERTIORARI

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No. 1036

RUSSELL LASH, as Warden of the Indiana State Prison,

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vs.

GEORGE ROBERT BROWN,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI, AND RESPONSE IN OPPOSITION TO RESPONDENT'S CROSS-PETITION FOR WRIT OF CERTIORARI

REPLY TO RESPONDENT BROWN'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

A) The Warden Accurately Set Out the Facts Serving As The Basis For His Petition.

Resondent's, hereafter referred to as Brown, ground for opposing Petitioner's, hereafter referred to as the

Warden, petition for a writ of certiorari is that the Warden's argument that the court of appeals exceeded its authority when it remanded the cause to the district court on an issue never presented by either of the parties to the district court or the court of appeals is not supported by the record. This, the Warden submits, as ludicrous.

The district court never decided the issue of the voluntariness of Brown's confession. The district court's order and memorandum are set out in the Appendix to the Warden's Petition at pp. A-15 to A-24. The district court decided only the competency of counsel question and death penalty questions. On appeal to the court of appeals the only issue presented by Brown, in addition to the death penalty issues, was "Was Petitioner denied the effective assistance of counsel, as guaranteed by the 6th and 14th Amendments to the Constitution of the United States, at his post-conviction coram nobis hearing held before the Lake Criminal Court on June 1, 1960?" See Brown's opening brief in the court of appeals, pp. 2-3.

Secondly, eleven (11) pages of The Statement of the Case in Brown's brief on appeal were devoted solely to the competency of counsel issue. See Brown's opening brief in the court of appeals, pp. 8-19. At the top of page 8 appears the caption "Statement of the Facts Relevant To Petitioner's Claim of the Denial Of the Effective Assistance of Counsel." There is no such caption signaling facts pertaining to the voluntariness of Brown's confession. And finally, Brown's first argument in his opening brief in the court of appeals is signaled by the caption "Petitioner's Claim of the Denial of the Effective Assistance of Counsel At His Post-Conviction Coram Nobis Hearing," at p. 19. Brown's first argument in his opening brief in the court of appeals is devoted solely to the issue of Competency of Counsel.

See pp. 19-39. Brown did not present the court of appeals with an issue pertaining to the voluntariness of his confession.

B) Additional Authority.

The recent case of *Procunier v. Atchley*, O.T. 1970, Cause No. 44,8 Cr.L 3057, decided on January 19, 1971, by this Court is dispositive of this case. In this case the court of appeals failed to make the threshold determination that Brown would be entitled to relief if his allegations regarding the voluntariness of his confession were believed. Brown had already had a determination in the state courts of the voluntariness of his confession. Brown's contentions in the district court were that he had discovered new evidence bearing on the voluntariness of his confession and that his court appointed counsel at the State post-conviction hearing was incompetent for failing to uncover this evidence. Brown relies on six (6) factors which he claims would have produced a different result in the state court had they been introduced. Those factors are set out in the decision of the court of appeals. See the Appendix to the Warden's Petition, pp. A-5 to A-9. An examination of those factors clearly shows that even if believed they would not entitle Brown to relief in the district court. Thus, whether this Court accepts the Warden's version of the proceedings in the court of appeals and in the district court or Brown's version, the conclusion is inescapable that the court of appeals erred in remanding the case to the district court for further proceedings.

II

RESPONSE IN OPPOSITION TO BROWN'S CROSS-PETITION FOR A WRIT OF CERTIORARI.

The District Court and Court of Appeals Properly Abstained From Deciding The Death Penalty Issues since Brown Has Not Exhausted His Available State Court Remedies.

Contrary to Brown's assertion, the court of appeals passed on all of the death penalty issues. While specifically noting the *Witherspoon* issue, *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the court of appeals abstained from deciding any of the death penalty issues on the theory that *all the death penalty issues* should first be presented to the Indiana courts. See the Appendix to the Warden's Petition, p. A-12.

The district court and the court of appeals properly abstained from deciding the death penalty issues for Brown's failure to have exhausted available state court remedies. *Boulden v. Holman*, 394 U.S. 478, 484, 485 (1969); 28 U.S.C. §2254.

However, inasmuch as the death penalty issues are already before this Court in other cases, it might be well that this Court assumes jurisdiction of this cause for the purpose of resolving the death penalty issues raised here. After some fifteen (15) years of litigation, this case deserves to be laid to rest with some sort of finality.

Respectfully submitted,

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